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6 CITY OF COLFAX CIVIL SERVICE COMMISSION

7 In re the Discharge of Chief Rick
8 McNannay,

)
) NO. 09-2-05647-6

)
) **CHIEF MCNANNAY'S REPLY IN**
) **SUPPORT OF MOTION FOR**
) **SUMMARY JUDGMENT**
)

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12 **I. INTRODUCTION**

13 Instead of actually responding to the very narrow issue of its failure to provide
14 'perjury' and 'dishonesty' as the just cause for firing of Chief McNannay, the City has
15 embarked on fanciful revisionist history introducing matters not even remotely previously
16 raised. The City utterly fails to satisfy its burden of establishing that "*just cause*" existed
17 for Chief McNannay's termination based on Clear Risk's "*finding of dishonesty*." Instead,
18 the City attacks this Commission's credentials, qualifications, experience, and impartiality,
19 and attempts to fabricate entirely new purported "*justifications*" for its unlawful termination
20 of Chief McNannay's employment. The City's blatant refusal to recognize the
21 Commission's authority, and its continually shifting purported "*justifications*" for Chief
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1 McNannay's termination, merely underscore the City's bad faith and retaliatory motives in
2 this case. Thus, Chief McNannay's motion for summary judgment should be granted.
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4 II. FACTS

5 While Chief McNannay disputes and denies the City's self-serving and creative
6 recitation of the City's new "facts" in their entirety, for purposes of this motion it is
7 unnecessary to address the City's many misrepresentations and outright falsehoods. This is
8 because the City's invented history does not in any way create genuine issues of material
9 fact regarding the City's failure to establish that it terminated Chief McNannay in good
10 faith for just cause.
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13 Notably, the City very clearly identified its sole basis for Chief McNannay's
14 termination in the 1/17/19 termination letter: *"This shall serve as notice that your*
15 *employment with the City of Colfax is terminated as of the date of this letter for dishonesty*
16 *in violation of section 5/02 of the City of Colfax Civil Service Commission Rules &*
17 *Regulations. ... Nevertheless, based on the findings of dishonesty and perjury by Clear*
18 *Risk's investigation, the City of Colfax cannot continue to employ you in its Police*
19 *Department."* **Ex. V**, filed 6/21/19.
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22 The City further reiterated its sole purported basis for Chief McNannay's termination
23 in its 5/29/19 "Reinstatement" letter, in which the City admitted it could not satisfy its
24 burden of proving that "perjury" provided a basis for Chief McNannay's termination:
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1 “Your termination was based on the findings of dishonesty and perjury by Clear Risk’s
2 independent investigation relating to you signing certifications that you complied with RCW
3 43.101.095 in the hiring of City of Colfax police officers.” Ex. X, filed 6/21/19.
4 Continuing, the City stated “Nevertheless, since the finding of perjury served as the crux for
5 the City’s decision to terminate you, the City finds that without a likelihood of perjury, a
6 less severe discipline is justified.” Id.
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9 The City subsequently represented to the Commission in a strained effort to contrive
10 an argument, that while it could not establish “perjury,” “just cause” somehow still existed
11 for termination based on Clear Risk’s purported “finding” of “dishonesty” arising out of 1)
12 Chief McNannay’s execution of the 2016 hire forms, and 2) Chief McNannay’s inability to
13 recall specific details of his 2016 hires during his Clear Risk interview more than two years
14 later. The City now appears to abandon those purported “justifications” as well.
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17 In its place, the City advances a new and equally spurious theory of “dishonesty”. In
18 particular, the City now apparently claims that Chief McNannay was “dishonest” because
19 he occasionally used the word “grandfathered” to describe Ms. Jones’ confirmation that he
20 could move forward with his 2016 part-time hires despite failure to satisfy the
21 poly/psych/background requirements for those officers. This new theory is based on the
22 City’s contorted claim that the Mayor and Ms. Mathis purportedly interpreted Chief
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1 McNannay's use of the term "*grandfathered*" to mean that the City was in compliance with
2 the statutory hiring mandates.

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4 However, it is undisputed that Ms. Jones informed Chief McNannay "*that given the*
5 *time that had passed and his misunderstanding of the statute, we needed to move forward*
6 *and all new people needed to satisfy the poly/psych/background mandates.*" Jones Decl.,
7 dated 6/24/19. As Chief McNannay explained in his deposition, "*I used [“grandfathered”*
8 *because I think we had this conversation before and I used it for lack of a better term, they*
9 *just waived, grandfathered, whatever.*" Ex. AA, McNannay Dep. Transcript, pp. 133-4, ll.
10 1-14. While Chief McNannay's use of the word "*grandfathered*" to describe this
11 conversation was perhaps imprecise, it was in no way "*dishonest*".
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14 Unable to satisfy its burden of proving that Clear Risk's "findings" of "dishonesty"
15 provided just cause for termination, the City further attempts to muddy the waters by once
16 again improperly introducing its own purported settlement offer as substantive evidence,
17 and by citing to additional new and irrelevant accusations against Chief McNannay.
18 However, the January 11, 2019 Termination letter and May 29, 2019 Reinstatement letter
19 confirm that none of the new "justifications" introduced by the City in its latest retaliatory
20 action were ever identified as a basis for the Chief's termination.
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1 1) Chief McNannay was not terminated because he hired Officers Perez,
2 Handley, Spitzer and Emerson in 2016 without complying with the poly/psych/background
3 mandates;¹

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5 2) Chief McNannay was not terminated for hiring an officer who was previously
6 terminated by another agency and/or an officer who had left his prior employer prior to
7 completing his probationary employment;²

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9 3) Chief McNannay was not terminated because he allegedly mismanaged the
10 Police Department budget;

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12 4) Chief McNannay was not terminated because he signed contracts on behalf of
13 the Police Department, including the WSU contracts, between 2012 and 2017;

14 5) Chief McNannay was not terminated because he allowed his officers to
15 perform work during the WSU games;

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17 6) Chief McNannay was not terminated because of the alleged suspicious
18 package (poster/tapestry) incident occurring in February 2018;

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21 ¹ Incidentally, Ms. Jones' Declaration filed by the City confirms that the failure to perform these examinations does not
22 affect the validity of an officer's certification, which is personal to the officer and as the City notes, "*follows the officer*
23 *to subsequent employers regardless of whether the poly/psych/background investigations are performed.*" City's
24 Opposition, p. 10.

25 ² The City provides no evidence that Chief McNannay ever misrepresented the reasons these officers left their prior
26 employment to Ms. Jones or anyone else. Further, the City provides no evidence that these factors would or did in any
way affect those officers' status as fully commissioned and certified officers. Instead, the City merely inane notes that
Ms. Jones had not been aware of the circumstances surrounding these officers' separations from their prior
employment. However, the City provides no evidence that Ms. Jones' directives to Chief McNannay would have
differed and/or that CJTC would have required, or had the authority to require, that the omitted investigations be
administered for these officers as a result, even if Ms. Jones had known of the reasons these officers left their prior
employment.

1 7) Chief McNannay was not terminated because he allegedly failed to submit a
2 grant request to obtain reimbursement for certain CPD expenses in 2017;

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4 8) Chief McNannay was not terminated because he failed to complete the
5 requisite number of training courses required by CJTC for 2017; and

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7 9) Chief McNannay was not terminated because he allegedly “exposed” the City
8 to liability based on any of the above conduct, most of which occurred and the City knew of
9 1-2 years prior to his January 11, 2019 termination.

10 Chief McNannay was certainly never provided with any “*written notice*” prior to his
11 termination that the City was terminating him and/or otherwise taking any specific
12 disciplinary action against him on the basis of any of the above allegations. These are all
13 new and contrived claims by the City. Indeed, it is undisputed that Chief McNannay was
14 also never given any opportunity to address or respond to any of these new allegations
15 during the November 29, 2018 “*disciplinary hearing*,” which was confined to a discussion
16 of certain “*findings*” identified in Clear Risk’s initial report. See Ex. BB, Mayor Transcript,
17 pp. 308-10, ll. 15-2; see also Ex. P, filed 6/21/19. Thus, these newfound alleged
18 “*performance issues*” are wholly irrelevant to the sole issue remaining before this
19 Commission: Whether the City terminated Chief McNannay’s employment in good faith
20 and for “*just cause*” based on Clear Risk’s findings of “*dishonesty*”. The undisputed facts
21 and evidence in this case confirm it did not.
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1 The City also misrepresents the facts in exaggerating that Chief McNannay was
2 subjected to “*progressive discipline*” on the basis of the above “*performance issues*”
3 leading up to his termination. With the exception of the alleged failure to submit grant
4 paperwork in 2017, for which a 12/6/17 written reprimand was the sole disciplinary action
5 taken, no other progressive discipline was imposed on the basis of the above alleged issues.
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7 See Id. – Mayor Transcript, pp. 172-3, ll. 20-11.
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9 The Mayor has also testified that prior to that 12/6/17 letter of reprimand, the Mayor
10 could not recall any specific disciplinary actions taken against Chief McNannay beyond
11 “*ongoing conversations, about budget challenges,*” which he confirmed were not
12 “*necessarily discipline.*” Id., p. 156, ll. 2-21. Similarly, contrary to the City’s latest
13 misrepresentation that Chief McNannay was disciplined for signing hospital contracts
14 earlier in 2017, the Mayor actually testified that his conversation with Chief McNannay
15 about this issue was also not considered a disciplinary action. **Ex. BB**, Mayor Transcript,
16 pp. 154-5, ll. 6-12 (“*No, I wouldn’t call it disciplinary*”). The Mayor also confirmed in his
17 deposition that although he “*verbally reprimanded*” Chief McNannay on the basis of the
18 alleged issues identified in **Exhibit 10** to its Opposition brief, the unsigned “*reprimand*”
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1 itself was actually a mere draft that the Mayor prepared but never actually gave to Chief
2 McNannay. See Id., p. 216-7, ll. 9-25. and Exhibit 15 thereto, at CSR 00366³.

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4 The City also misrepresents that Chief McNannay was somehow subjected to
5 disciplinary action due to the number of hours his officers occasionally worked as a result
6 of the WSU games. Mayor Vanek actually testified that while this issue was discussed,
7 Chief McNannay never received any verbal or written reprimand on this basis. Id., p. 230-
8 1, ll. 18-12. Likewise, Chief McNannay was not disciplined for the “suspicious package
9 incident” on which the City now seeks to rely. Id., p. 206, ll. 3-12” (*“I asked questions, I
10 gave him my perspective on it. So, it was a conversation about the ‘suspicious package
11 incident,’ but it was not a direct verbal reprimand or any other kind of very specific
12 discipline.... I ultimately did not discipline Chief McNannay related to the ‘suspicious
13 package incident.’”*). Thus, the City’s disingenuous reference to these alleged “issues” is
14 nothing more than further evidence of its own ongoing efforts to defame and destroy Chief
15 McNannay’s reputation and career.
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19 In that regard, the undisputed facts do confirm that the City began actively seeking a
20 basis to terminate Chief McNannay, including preparing “draft” disciplinary documents
21 never provided to him, only *after*, and primarily based on, Chief McNannay’s wage claim
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25 ³ Incidentally, that “draft” reprimand actually provides further direct evidence of the Mayor and City’s retaliatory
26 motive and intent to take adverse employment action against Chief McNannay on the basis of his protected speech to
the City Council and public. That “draft” reprimand specifically identifies Chief McNannay’s protected speech in his
report and his “*involvement with the press attending the meeting*” as the basis for the adverse action proposed.

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1 and exercise of his First Amendment rights. Chief McNannay was thus deprived of any
2 meaningful opportunity to respond to or address most of the alleged performance
3 deficiencies described therein, which the City nonetheless now improperly seeks to inject
4 into this proceeding as part of its blatant smear campaign. The City's retaliatory efforts
5 ultimately culminated in the City's decision to retain its own insurance adjuster Clear Risk
6 to "*investigate*" Chief McNannay based on events that occurred two years earlier in October
7 2018.
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10 It is undisputed that the City then withheld material information from the
11 "*investigator*", including but not limited to 1) the fact that the City knew in 2016 that the
12 poly/psych/background exams had not been performed for the officers at issue, and 2) Ms.
13 Jones' 11/26/18 email confirming her directives to Chief McNannay - which was only
14 provided to Clear Risk after Chief McNannay's 11/29/18 disciplinary hearing. Thereafter,
15 the City summarily terminated Chief McNannay based solely on Clear Risk's "*findings*."
16 This was without any further inquiry or investigation, despite Ms. Jones' email and the
17 availability of the information that the City has since acknowledged rendered its termination
18 decision untenable.
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22 Thus, it is clear that the City's newly stated and prior justifications for terminating
23 Chief McNannay are mere pretext. The evidence is clear that Chief McNannay was
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1 actually terminated in bad faith for political reasons, in retaliation for his wage claim and
2 the exercise of his First Amendment Rights.
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4 **III. ARGUMENT**

5 **A. Standard of Review and Authority.**

6 The City's claim that this Commission lacks the authority to preside over this matter
7 is nothing more than a desperate attempt to bully and intimidate the Commission into
8 ignoring the City's misconduct and unlawful termination of Chief McNannay's
9 employment. During the Scheduling Conference conducted on March 5, 2019, the City
10 specifically stipulated to having pre-hearing motions heard on July 2, 2019. If the City
11 truly questioned the Commission's authority to rule on such motions, that would have been
12 the appropriate time to raise such concerns, rather than in response to a motion subsequently
13 filed pursuant to that conference several months later. In any event, under RCW
14 41.12.040(5), the Commission has extremely broad authority and discretion in how it
15 conducts its hearings and investigations:
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19 *Hearings and Investigations: How conducted. All hearings and investigations*
20 *before the commission, or designated commissioner, or chief examiner, shall*
21 *be governed by this chapter and by rules of practice and procedure to be*
22 *adopted by the commission, and in the conduct thereof neither the commission,*
23 *nor designated commissioner shall be bound by the technical rules of*
24 *evidence. No informality in any proceedings or hearing, or in the manner of*
25 *taking testimony before the commission or designated commissioner, shall*
26 *invalidate any order, decision, rule or regulation made, approved or*
confirmed by the commission... RCW 41.12.040(5)(emphasis added).